87-1466

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

NO._____

IN THE UNITED STATES SUPREME COURT
JANUARY TERM, 1988

FRED H. AINSWORTH AND GLORIA AINSWORTH
PETITIONERS

VERSUS

SHELL OFFSHORE, INC.
RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOHN WYETH SCOTT
CRAVEN, SCOTT & RANDOW
POST OFFICE BOX 1912
ALEXANDRIA, LOUISIANA 71309
TELEPHONE: 318/445-1474

QUESTIONS PRESENTED FOR REVIEW

1. Is there any genuine dispute(s) of material facts(s). Was the District Court in error to sustain a motion for summary judgment when defendant (Shell) failed to submit any affidavit or any deposition of any person who was on the offshore platform at the time of the accident; when defendant presented no evidence whatsoever regarding the actual behaviors, acts and omissions of Shell personnel on the platform; when defendant presented no evidence whatsoever regarding the accident itself, the fact that the drawworks was an appurtenance of the platform, and the acts and omissions creating such dangerous conditions.

    a. Whether or not the District Court was in error to sustain a motion for summary judgment when the following material facts are disputed and plaintiffs' position is supported by affidavits (including affidavit of independent witness), disputed provisions of Shell contract, along with other evidence:

        1. The drawworks were complete and securely attached as an appurtenance and part of the platform;

        2. The Shell company men on the platform (including the man named "Bernie" whose identity has been withheld by Shell) was

fully aware and actually observed that the crew (including plaintiff) was being directed to work on this offshore platform at night without lights (without any electrical power or lights except a small flashlight) and without railing at high heights, that Shell personnel was in a position to prevent or stop the dangerous work procedures and conditions, that the Shell personnel had authority to intervene in such instances, that the Shell personnel failed to intervene and/or require safety rules to be followed, and the Shell man named "Bernie" even contended later after the accident that he'd directed the workers not to work at night (which affiant disputes as untrue);

3. The Shell personnel acquiesced to the dangerous procedures and never intervened to correct the obviously dangerous conditions;

4. That there were no lights on the platform or drawworks;

5. That plaintiff (Mr. Ainsworth) dropped a tool, tried to locate it in the dark, tripped and fell to the mudtanks below and was injured.

2. Where the Shell contract contains ambiguous and/or conflicting provisions,

many of those provisions reserving final control or authority over operations on the platform (including power to stop work or intervene in instances of dangerous procedures) to the defendant; where other provisions of the contract ambiguously seek to delegate responsibilities to the contractor; and where the contract was written and prepared by the defendant, the question is whether this contract should be interpreted strictly against the party who prepared it and in favor of innocent third parties.

3. Whether the motion for summary judgment was decided prematurely at a time when new counsel had just begun representation of plaintiffs, when discovery was not complete, when defendant had refused and failed to respond to discovery efforts (including pending interrogatories and motions to compel), when a motion to compel responses to said discovery efforts was pending for hearing before the Court and when the facts and information in possession of the Court was incomplete with numerous factual disputes unresolved.

   a) Should the District Court have invoked the provision of Rule 56 (F) to permit additional discovery (including the identity and depositions of the Shell company men, and other related information) and/or upheld the motion to compel discovery filed by plaintiffs, thereby continuing or dismissing the motion for summary judgment?

b) Was the District Court in error in failing to either hear or sustain plaintiffs' motion to compel discovery?

4. Whether the defendant (Shell) can delegate to the contractor its own obligation to the workforce on the platform to correct a vice or danger in the work premises; whether the defendant violated a duty to give notice of dissatisfaction and to correct vices or dangers in the work premises when such vices or dangers are known to defendant.

LIST OF PARTIES

1. Fred H. Ainsworth, Plaintiff

2. Mrs. Gloria Ainsworth, Plaintiff

3. Shell Offshore, Inc., Defendant

4. Hercules Offshore Drilling Company
   Third Party Defendant

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LOWER COURT OPINIONS

The opinions of the Fifth Circuit Court of Appeals are reported at 829 F.2d 548. The opinions of the District Court are reported at 649 F. Supp. 1223.

STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on October 14, 1987. Rehearing was denied by the Fifth Circuit Court of Appeals on November 9, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES WHICH CASE INVOLVES

43 U.S.C. 1333, et seq.

28 U.S.C. 1332.

Federal Rules of Civil Procedure 56

Federal Rules of Civil Procedure 56(f)

Louisiana Civil Code Article 2315

Louisiana Civil Code Article 2317

Louisiana Civil Code Article 2321

Louisiana Civil Code Article 2322

STATEMENT OF THE CASE

This lawsuit arises from a maritime accident that occurred on a stationary offshore platform owned by Shell Oil Company (hereinafter referred to as "Shell") on the Outer Continental Shelf, which had contracted with Hercules Offshore Drilling Company, Inc., (hereinafter referred to as "Hercules") to provide and operate a drilling rig on this platform. Hercules was the employer of Mr. Ainsworth. The accident occurred on October 25, 1984. The derrick had not yet been brought to the platform. The plaintiff, Mr. Ainsworth, fell at night from the drawworks to the top of the mudtanks below. No electrical or lighting system was operating and there were no handrails. The drawworks were welded secure and were part of the platform. Rigging up was underway to run lines and chains in preparation for the derrick.

Shell filed a motion for summary judgment. This motion was sustained by the Honorable Judge F. A. Little, Jr., Western District of Louisiana. Rule 56 of the Federal Rules of Civil Procedure requires there be "no genuine issue as to any material fact", and that mover be entitled to judgment "as a matter of law" before such an extra-ordinary motion be sustained. Neither requirement is met in the present case, and, to the contrary, plaintiffs would be entitled to judgment after a fair trial on the merits.

Plaintiffs show that this motion was ruled upon at a time when discovery was incomplete, when plaintiffs' interrogatories and motions to produce were unanswered; motions to compel answers and production were pending before the Court. Please note the absence of testimony of Shell's company men

on the platform; there are no depositions of Hercules personnel. Their identities have not been disclosed; their testimony is absent on the factual disputes of who was in authority and who was responsible for the crew working at night with no lights.

The District Court sustained the Motion for Summary Judgment on December 10, 1986, and simultaneously refused to hear plaintiffs motions to compel answers to plaintiffs interrogatories and production.

JURISDICTION OF FEDERAL COURT IN LOWER COURT

This Court has jurisdiction by virtue of the Outer Continental Shell Lands Act, 43 U.S.C. 1333, et seq., and diversity of citizenship, 28 U.S.C. 1332.

ARGUMENT

A. Genuine Issues of Material Facts

Mr. Ainsworth testified Shell supervisors were present and involved in oversight or supervision of the work (Ainsworth deposition, Pages 38 and 39, Exhibit B); we have not been allowed to learn what the situation and circumstances were that led to Mr. Ainsworth's injury, why the platform was without lights and electricity, and why the crew was directed to work at night without lights. The affidavit of Derrel Cruse has confirmed the danger of no lights, the presence and awareness of Shell personnel, the apparent belief of the Shell company man that he had the authority to direct the crew on whether or not to work in darkness (please note the affiant confirms that the Shell

company man contended he had directed the crew not to work; Cruse disputes this claim).

Two depositions have been taken by Mr. Ainsworth's original counsel (Mr. B. Gerald Weeks). Please note that neither of the deponents were on the platform and they knew nothing of the facts, events, acts and omissions of Shell personnel on the platform. Present counsel was retained at the end of August, 1986, at which time appropriate discovery motions and actions were immediately taken. Please note that the interrogatories propounded on August 19, 1986 to Shell specifically addressed many material, unresolved factual disputes. Plaintiffs have been deprived of their right to have responses to this discovery.

A long list of material factual issues remain in dispute:

1. Shell contends that the "rig" was under construction and incomplete and therefore not a part of the platform; however, Shell has no fact witness, no photographs nor any document to this effect. No member of the platform crew has testified in support of Shell's position. Actually, there was no "rig" at this platform. There was only the platform and the drawworks. The plaintiff's evidence establishes that the structure of the drawworks was in place and welded on an appurtenance of the platform (Cruse affidavit, Exhibit A). Mr. Ainsworth's testimony and fellow employee Derrel Cruse's affidavit are adverse to Shell on this issue (see Ainsworth deposition, page 49, Exhibit B; Cruse affidavit, Exhibit A).

2. Did Shell fail to provide lights on the platform? There should have been a source of electricity on the platform (which is owned by Shell). Without electricity, there were no lights. Why did the platform lack electricity?

3. How many Shell employees were on the platform and what de facto supervision, control and right of approval and/or disapproval were the Shell personnel actually exerting on the platform?

4. What knowledge and awareness did the various Shell personnel have, and what role did they play, in the crew (including Mr. Ainsworth) being

directed to work at night without lights? (Please see Cruse affidavit, Exhibit A, confirming knowledge and awareness of Shell personnel).

5. What efforts had been undertaken to secure lights?

6. Why were there no handrails?

Each of these fact issues, along with others already cited, are in dispute and no evidence (no deposition or affidavit) has been presented by Shell to support its position on these issues.

B. The Evidence

The only evidence submitted by Shell was a copy of its contract with Hercules. Most of the applicable provisions of this contract indicate Shell was in final authority and control on the platform; that Shell personnel had a duty to intervene in instance of known dangerous defects and violations of safety.

Plaintiffs submitted in opposition to the Motion for Summary Judgment the following evidence:

Exhibit A - Affidavit of Derrel Cruse

Exhibit B - Deposition of Fred Ainsworth

Exhibit C - Original complaint

Exhibit D - Accident Report

Exhibit E - Well Completion or Recompletion Report and Logs

Exhibit F - Shell Oil Lease

Exhibit G - Interrogatories propounded to Shell Oil Company

Exhibit H - Request for Production of Documents to Shell Oil Company

Exhibit I - Interrogatories propounded to Hercules Offshore Drilling Company

Exhibit J - Request for Production of Documents to Hercules Offshore Drilling Company

Exhibit K - Deposition of Arthur Dunn

Exhibit L - Master Drilling Contract

These documents are now a part of the appellate record.

Shell's motion for summary judgment cites no specific basis or grounds; the elements of its defense are not supported by any affidavit of any person having any first-hand knowledge of events, circumstances, conditions, and/or actual acts and omissions of Shell personnel on this platform.

The Cruse affidavit (Exhibit A) confirms that there were not lights, no electrical power for lights, that Shell personnel was present (and did not object) when the crew was directed to work at night in darkness with only small flashlights. Mr. Cruse also describes how Mr. Ainsworth tripped and fell in the darkness; the absence of handrails; that one of the Shell company men later tried to say he had directed the crew not to work (which Cruse disputes as untrue).

Please note that the absence of lights brings duties upon Shell to intervene by vir-

tue of the following provisions of the Shell-Hercules Contract: Section 5.1, 5.3, 6. and 16.2 of the Master Drilling Agreement.

Mr. Dunn (Shell corporate executive) testified the contract did not cover the question of each party's responsibility during the "rigging up" phase (see Dunn deposition pages 56 and 57, Exhibit K). If true, then it remains unresolved even from Shell's perspective whether Shell or Hercules had the primary duty to provide the lights at the time of this accident; the duty to provide lights would at minimum be the joint duty of both Shell and Hercules.

In any event, Shell cannot delegate to the Contractor its own obligation to Mr. Ainsworth to correct a vice or danger in the work premises, Olsen v. Shell Oil Co., 365 So.2d 1285 (1979); Klein v. Young, 163 La. 59, 111 So. 495 (1927).

C. The Law

(1) Louisiana Civil Code Article 2315: Negligence

There was an obvious danger, i.e. the practice of working the crew at night in darkness without lights on an offshore platform. This was not a defect created by a sudden situation or action by a third party. There were no lights or electrical power on the platform from the inception of work on the platform (Ainsworth deposition page 32 and 33, Exhibit B). Shell cannot simply sign a contract and "wash its hands" of its responsibility to require correction of a vice or defects in the workplace, Olsen v. Shell Oil Co., 365 So.2d 1285 (La. 1979). Please note that the Olsen case was certified by the U. S. Court of Appeals Fifth Circuit to the Louisiana Supreme Court to resolve this very legal question. The owner of a

stationary platform cannot ignore a vice or danger on such a structure (including superstructure or a derrick located on the platform) and cannot contractually delegate . . . .to any third party its responsibility to correct a danger. Olsen v. Shell Co., supra; Klein v. Young, supra; Camp v. Church Wardens, 7 La.Ann. 321 (1852).

Shell contends that its contract immunizes it from responsibility. Section 16.2 of the contract declares Shell's authority to monitor the work to be certain it is done properly, safely and in accord with the agreement. As already noted, the contract fails to designate which party (Shell or Hercules) is responsible for lights. Furthermore, Section 5.1 clearly states Shell personnel's final authority on the platform over Hercules:

> "5.1 Well-to-Well Contracts. In well-to-well contracts, Shell shall have the right to terminate the performance of the work covered by the Drilling Order for any reason at any point it may desire. . . ."

The power to terminate work at any time "for any reason" establishes that final authority and control always remains with Shell.

(2) Louisiana Civil Code Article 2322: Strict Liability

Louisiana Civil Code Article 2322 provides as follows:

> The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction."

In Olsen v. Shell Oil Co., 561 F.2d 1178 (5th Cir. 1977); 574 F. 2d 194 (1978) certifying question to the Louisiana Supreme Court; 365 So.2d 1285 (1979); 595 F.2d 1099 (5th Cir. 1979), the United States Court of Appeal, Fifth Circuit, certified to the

Louisiana Supreme Court certain questions, including whether the owner of an offshore drilling platform could be held strictly liable to employees of the independent contractor pursuant to the Louisiana Civil Code absent existence of control of the premises; whether injuries sustained by an employee of the independent contractor are a result of "ruin" of the building when caused by the explosion of a hot water heater attached to the living module attached to the platform; whether the modular drilling rig attached to the platform but not owned by the owner of the platform constitutes an "immovable by attachment", and whether the owner of the platform could be held strictly liable for injuries sustained upon the attached rig structure.

The Louisiana Supreme Court held that the platform owner was liable, Olsen, supra.

The Louisiana Supreme Court first concluded that fixed offshore drilling platforms constitute buildings for such purpose (see page 1289 of the decision, supra); also see Mott v. Odeco, 577 F.2d 273 (1978).

The second issue in Olsen arose from the contract between Shell (owner of the platform) and the contractor Movible. The Supreme Court noted that it is well settled that appurtenances to structures and movables made immovable by attachment also are included as the "building" under Article 2322, supra, page 1291 of Olsen, decision; see also Moczygemba v. Danos and Curole Marine Contractors, 561 F.2d 1149 (CA 5, 1977).

In Olsen, Shell argued it cannot be held delictually responsible for unknown and non-obvious defects. The Louisiana Supreme Court

disagreed on page 1291 of its decision and held Shell liable.

In the present case, we are dealing with obvious and known dangerous defects, not hidden dangers as in Olsen. Surely the duty of Shell to correct a danger is even stronger when its personnel has clear knowledge of the dangerous defect. In the present case, the entire drawworks was a secured appurtenance of the platform and an immovable part of the "building" Just the sheer size and massive weight renders this object immovable. It had become a integral part of the platform, see Willis v. Cajun Electric Power Co-Op, Inc., 484 So.2d 726, p. 732 (La. App. 1 Cir. 1986).

Thirdly, the Supreme Court found no merit to the contention that an unknown defect such as the explosion of a water heater is not a "ruin" of the building or "a

vice in its original construction", as provided in Article 2322. If the owner is to be held responsible for an unknown "vice" or "ruin" such as a faulty water heater valve in the contractor's modular living quarters, then the owner is even more clearly responsible for an obvious, known or clearly recognizable "vice" such as no system of electricity and no lights for a crew expected to work on the platform at night!

Shell cannot even claim (as it did in Olsen) that Hercules was responsible for failure to have a system of lights. Afterall, Mr. Dunn of Shell pointed out in his deposition that the contract was silent on this issue and did not state Hercules would have any such responsibility for "rigging up". (Dunn deposition, page 56, 57, 59, 60 and 61, Exhibit K). Furthermore, Mr.

Dunn acknowledged that the Shell platform should have provided a source of power for lights for use by the workmen at night (Dunn deposition, pages 29, 30 and 31, Exhibit K).

(3) Louisiana Civil Code Article 2317: Strict Liability

Louisiana Civil Code Article 2317 provides as follows:

> "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications."

In specifically citing Louisiana Civil Code Articles 2317, 2321 and 2322, the Supreme Court ruled that the owner of the platform is not exonerated from its non-delegable responsibility by alleged intervening fault of a contractor (such as Hercules), who is not a third person stranger. As the Supreme Court

observed, the contractor is "a person acting with the consent of the owner in the performance of the owner's non-delegable duty to keep his building in repair," pages 1293-4 of the Olsen decision, supra.

In the present case, Shell owned the platform but the platform had no power source and no lights on it. This was a pre-existing condition that was apparent long before Mr. Ainsworth arrived on the platform and the night crew began its work. Shell's company man was present "to determine whether work is being performed by Contractor in accordance with all of the provisions of this agreement and Drilling Order" (including safety provisions, see Section 16.2 of Master Drilling Agreement, Exhibit L). Still no lights were in place; yet the crew was working at night. The Shell company man was present and wit-

nessed these facts (see Derrel Cruse affidavit, Exhibit A). The accidental injury occurred upon drawworks that were already completed and attached as part of the platform.

As for the "custody" issue, Shell was the owner of the platform and never relinquished final control over all operations (please see previously cited contract provisions).

CONCLUSION OF ARGUMENT

There are many unresolved factual questions. Shell has not submitted any evidence whatsoever on the facts of the accident i.e., the behavior and authority exercised by Shell representatives on the platform; why there was no electrical power

on the platform; why was work occurring at night without lights; who made the decision to work at night with no lights; did Shell personnel make or acquiesce to such decision; what type of work had been completed and what type of work was being done; why was there an absence of a light system; the location, time or cause of the accident; whether the absence of lights, the decision to work at night and the resulting accident was Shell's fault; et cetera).

We have cited in this brief many genuine and salient issues of material fact to be resolved at trial, including the presence of Shell representatives at all pertinent times; the actual authority, role and purpose of the Shell personnel; the absence of a railing in the location where Mr. Ainsworth fell; the awareness of Shell personnel of the danger

and their actual actions, omissions and behavior; the attachment of the drawworks as an immovable object, an appurtenance and a part of the platform; the acquiescence of Shell to numerous safety violations; whose responsibility was the absence of electricity and lights; the inability of Mr. Ainsworth to refuse work at night without lights as he would face losing his job, among many others.

Mr. Ainsworth's testimony confirmed the presence of Shell company men. The affidavit of Derrel Cruse further confirms the present of and the fact that Shell personnel was culpable and at fault due to negligent acts and omissions.

The complaint, the depositions, the contract which reserves final authority and control to Shell, the Cruse affidavit confirming Shell's negligent acts and omissions,

and the strict liability provisions of Louisiana Civil Code Articles 2317 and 2322 demonstrates that plaintiff Fred H. Ainsworth is entitled to judgment against Shell for damages in this lawsuit. Accordingly, Shell's motion for summary judgment should be dismissed.

Respectfully submitted.

CRAVEN, SCOTT & RANDOW

JOHN WYETH SCOTT
1535 Jackson Street
Post Office Box 1912
Alexandria, La. 71309
Telephone: 318/445-1474
Attorneys for Fred H. Ainsworth
and Gloria Ainsworth,
Plaintiffs

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 87 4006

FRED H. AINSWORTH, ET AL.,

Plaintiffs-Appellants,

versus

SHELL OFFSHORE, INC.,

Defendant-Appellee

Appeal from the United States District Court
for the Western District of Louisiana

ON PETITION FOR REHEARING

(November 9, 1987)

Before CLARK, Chief Judge, RANDALL and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

s/ W. Eugene Davis
United States Circuit Judge

829 F.2d 548

Fred H. AINSWORTH and Gloria Ainsworth, Plaintiffs-Appellants,

v.

SHELL OFFSHORE, INC., Defendant-Appellee.

No. 87-4006

United States Court of Appeals, Fifth Circuit.

Oct. 14, 1987

Rehearing Denied Nov. 9, 1987.

Employee of independent contractor, that was hired to erect drilling rig on offshore platform, brought action against platform owner for damages based upon injury sustained during rigging operation. Owner moved for summary judgment. The United States District Court for the Western District of Louisiana, 649 F.Supp. 1223, F.A. Little, Jr., J., granted summary judgment in favor of owner.

Employee appealed. The Court of Appeals, W. Eugene Davis, Circuit Judge, held that: (1) owner was not liable for offenses of independent contractor that caused injuries, in that drilling operations were not ultrahazardous activity and owner did not retain control of project; (2) owner was not in custody of drilling rig and was not strictly liable; and (3) owner was not liable to employee pursuant to Louisiana article, which imposes liability upon owner of building for injury resulting from building's ruin.

Affirmed.

1. Shipping - 84(1)

Drilling operations on offshore drilling platform presented risk of harm that could be eliminated through exercise of due care and were not "ultrahazardous activity" within meaning of exception to immunity of principal from liability under Louisiana law for

offenses of independent contractor committed in course of performing its contractual duties. LSA-C.C. art. 2315.

See publication Words and Phrases for other judicial constructions and definitions.

2. Shipping - 84(1)

Owner of offshore drilling platform did not retain control over activity of its independent contractor in installing drilling equipment and, therefore, was not liable under Louisiana law for injury to contractor's employee as result of work during darkness. LSA-C.C. art. 2315.

3. Shipping - 84(3¼)

Drilling platform owner, whose representative was on platform when independent contractor was working its night crew without lights, did not have duty under Lousiana law to intercede in contractor's decision to install drilling equipment without lights. LSA-C.C. art. 2315.

4. Shipping - 86(2 3/4)

Evidence established that owner of drilling platform did not have custody of drilling rig being installed by independent contractor and that owner was not strictly liable to contractor's employee for injuries sustained during installation of equipment. LSA-C.C. art. 2317.

5. Shipping - 84(1)

Owner of offshore drilling platform, on which independent contractor was installing drilling rig, was not liable to contractor's employee pursuant to Louisiana article, which imposes liability upon owner of building for injury resulting from building's ruin; installation of drilling rig was only 20 to 25% complete when employee was injured. LSA-C.C. art. 2322.

John W. Scott, B. Gerald Weeks, Weeks & Wells, Alexandria, La., for plaintiffs-appellants.

Arthur A. Crais, Jr., Judith Y. Robertson, Adams & Reese, Edwin C. Laizer,

James E. Blazek, Scott E. Delacroix, New Orleans, La., for defendant-appellee.

Appeal from the United States District Court For the Western District of Louisiana.

Before CLARK, chief Judge, RANDALL and DAVIS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Fred and Gloria Ainsworth appeal the grant of a summary judgment dismissing their suit against Shell Offshore, Inc., 649 F.Supp. 1223 (W.D.La.1986). We find no error and affirm.

I.

Shell Offshore, Inc. (Shell) owns an offshore platform permanently affixed to the floor of the Gulf of Mexico on the Outer Continental Shelf off the Louisiana coast. Shell hired an independant contractor, Hercules Offshore Drilling Company (Hercules), to furnish a drilling rig and

drill a well from the bare Shell platform. The first step in Hercules' operation was to transport its drilling rig offshore and assemble it on the platform. During the process of installing its equipment on the rig, Hercules worked its crews around the clock. This work proceeded at night even though no lights were provided to illuminate the work area. Mr. Ainsworth was injured when, during a night shift, he searched for a dropped tool and fell. It is undisputed that the lack of lighting caused the accident. Mr. Coward, president of Hercules, admitted that Hercules was responsible for lighting their work area during the rig up.

Ainsworth sued Shell under Louisiana Civil Code articles 2315, 2317, and 2322. The district court granted Shell's motion for summary judgment and dismissed Ainsworth's action.

II.

A.

The district court correctly denied relief under Louisiana's general negligence provision, Civil Code article 2315.[1] Under Louisiana law, a principal generally is not liable for the offenses an independent contractor commits in the course of performing its contractual duties. See, e.g., Hawkins v. Evans Cooperage Co., Inc., 766 F.2d 904 (5th Cir.1985); Robideaux v. Hebert, 118 La. 1089, 43 So. 887 (1907). Although this rule is subject to two exceptions, neither of them applies to permit recovery against Shell in this case.

[1] Under the first exception, a principal may not avoid liability for injuries

1. Article 2315 provides, in pertinent part: "Every act of man that causes damages to another obliges him by whose fault it happened to repair it."

resulting from an ultrahazardous activity by hiring out the work to an independent contractor. See Hawkins, supra; O'Neal v. Int'l Paper Co., 715 F.2d 199 (5th Cir. 1983); Ewell v. Petro Processors, Inc., 364 So.2d 604 (La.App. 1st Cir.1978), writ refused, 366 So.2d 575 (La.1979). Activities included within the "ultrahazardous" category include pile driving, storage of toxic gas, blasting with explosives, and crop dusting; we must consider whether drilling operations are also to be considered ultrahazardous.

Whether an activity qualifies as ultrahazardous in Louisiana is a question of law. Hawkins, supra; Perkins v. F.I.E. Corp., 762 F.2d 1250 (5th Cir.1985). The court in Perkins discussed the Louisiana doctrine of ultrahazardous activity in detail, finding the doctrine to be defined by three boundaries: (1) the activity must relate to land or some other immovable; (2) the activity

itself must cause the injury, and the defendant must be engaged directly in the injury-producing activity; and (3) the activity must not require substandard conduct to cause injury. Id. at.1267-68. We need not consider the first two elements of this definition because drilling operations do not satisfy the third. This element requires that the activity "can cause injury to others, even when conducted with the greatest prudence and care." Kent v. Gulf States Utils. Co., 418 So.2d 493, 498 (La.1982). The "ultrahazardous" label is thus limited to those activities which present "a risk of harm that cannot be eliminated through the exercise of due care." O'Neal, 715 F.2d at 202.

We conclude that drilling operations are not ultrahazardous. We have discovered no Louisiana cases holding otherwise, and Louisiana courts routinely analyze personal

injury and property damage cases arising from drilling activities under negligence principles. See, e.g., Smith v. Shell Oil Co., 746 F.2d 1087 (5th Cir.1984); Knott v. Frank's Casing Crew & Rental Tools, Inc., 468 So.2d 798 (La.App. 1st Cir.1985); Franklin v. Oilfield Heavy Haulers, 478 So.2d 549 (La.App. 3d Cir.1985), writ refused, 481 So.2d 1330 (La.1986).

The second exception imposes liability upon a principal for the negligent acts of an independent contractor when the principal retains or exercises operational control. See Hawkins, supra; Wallace v. Oceaneering Int'l, 727 F.2d 427 (5th Cir.1984); McCormack v. Noble Drilling Corp., 608 F.2d 169 (5th Cir.1979); Touchstone v. G.B.O. Corp., 596 F.Supp. 805 (E.D.La.1984).

The Master Drilling Agreement describes the relationship between Shell and Hercules.

16.1 Independent Contractor

Contractor is an independent contractor with respect to performance of all work hereunder and neither Contractor nor anyone employed by Contractor shall be deemed for any purpose to be the employee, agent, servant or representative of Shell in performance of any work or service hereunder. Shell shall have no direction or control of Contractor or its employees and agents except in the results to be obtained. The work performed hereunder shall meet the approval of Shell and be subject to the general right of inspection provided herein for Shell to secure the satisfactory completion thereof.

16.2 ...Contractor shall perform and supervise all work hereunder....

Master Drilling Agreement at 25 (emphasis added).

[2] The appellants assert that the presence of a Shell "company man" on the platform is evidence of Shell's retained control of the project. Louisiana case law does not support this argument. In Williams v. Gervais F. Favrot Co., 499 So.2d 623 (La.App. 4th Cir.1986), an independent subcontractor's employees were injured while working on a construction site. The plaintiffs sued the building owner, alleging that the owner had retained sufficient control over the project to be held liable for the workers' injuries. By contract, the owner's contribution to the project was limited to the provision of plans and specifications and reservation of the right to insist on a final product that conformed to those plans. "The fact that [the owner] periodically inspected the jobsite to be sure that work was being performed in accordance with the specifications does not

constitute the exercise of operational control." Id. at 626. Further, the court in Hemphill v. State Farm Ins. Co., 472 So.2d 320 (La.App. 3d Cir.1985), wrote that the "control" determination "depends in great measure upon whether and to what degree the right to control the work has been contractually reserved by the principal. The supervision and control which is actually exercised by the principal is less significant." Id. at 322 (emphasis in original) (citation omitted).

The summary judgment evidence does not support the the imposition of liability against Shell. William C. Coward, the president of Hercules, testified that his company had full control of and responsibility for the operation. Coward deposition at 14-15, 24-25. He represented that "[n]o Shell employee would participate in the rig up procedure. At times, there would be an operator or representative on the platform. At other

times, there will not be. They are not required to be there, and they don't participate." Id. at 14. Under the contract, Shell's company man had no right to interfere in Hercules' operation; he only represented Shell's interest in the final product. Shell retained no control over Hercules' activity, and it may not be held liable for the independent contractor's acts under this theory.

[3] The appellants' final claim under article 2315 rests on the fact that the Shell representative was on the platform at the time Mr. Ainsworth was injured and knew that Hercules was working its night crew without lights. The appellants contend that Shell's knowledge of the danger to which the Hercules crew was exposed gives rise to a duty by Shell to intervene in Hercules' operation.

In Kent, 418 So.2d 493, the Louisiana Supreme Court considered the State's liability for injury to an independent

contractor's employee. In that case, the Louisiana State Department of Highways contracted with Barber Brothers Contracting Company (Barber) to widen a public roadway. The plaintiff, a Barber employee, was injured when the thirty-foot aluminum pole he was using to texture the highway came into contact with high voltage electrical lines. Although a State project engineer had observed the plaintiff using the aluminum pole beneath the power lines for some two hours, the supreme court declined to hold the State liable. The court stated that the engineer "arguably could have prevented the accident by interjecting himself and demanding that Barber furnish [the plaintiff] with a fiberglass rake, but he had no such duty to [the plaintiff], and is not liable for failing to do so. Furthermore [the engineer] did not affirmatively create a hazardous situation by requiring [the plaintiff] to use dangerous equipment or methods." Id.

at 500; see also Touchstone, 596 F.Supp. 805.

We conclude that Louisiana law will not support the imposition of liability upon Shell for failure to intercede in Hercules' decision to work without lights.

B.

[4] The district court properly granted summary judgment against the appellants' strict liability claims under Louisiana Civil Code article 2317.[2] The district court determined that Shell had no custody over the rig and was therefore exonerated as a matter of law.

Strict liability is imposed under article 2317 when (1) the thing causing damage was in the defendant's custody, (2) the thing had a vice or defect, and (3) the vice or defect occasioned damage. Stewart v. Sam Wallace Indus. Co., 409 So.2d 335

2. Article 2317 provides, in pertinent part: "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act...of things which we have in our custody."

(La.App. 1st Cir.1981), writ refused, 413 So.2d 497 (La.1982). "Custody" as it is used in this article means supervision and control. Steele v. Helmerich & Payne Int'l Drilling Co., 738 F.2d 703, 707 (5th Cir.1984); Colleps v. State Farm Gen. Ins. Co., 446 So.2d 988 (La.App. 3d Cir.1984).

The uncontroverted summary judgment evidence supports the district court's conclusion that Shell did not have custody of the Hercules drilling rig. Hercules' president, Mr. Coward, testified at his deposition that Hercules owned both the rig itself and all the drilling components and tools used in the rig-up procedure. Coward deposition at 14. He further testified that no Shell employee was expected to participate in the rig-up and that Hercules bore full responsibility for the operation. Id. at 14, 24. All the summary judgment evidence pointed to Hercules--not Shell--as the custodian. The district court correctly rejected Ainsworth's article

2317 claim against Shell.

C.

[5] Appellants finally argue that the district court erred in rejecting the claim they predicate on Louisiana Civil Code article 2322; this article imposes liability upon the owner of a building for injury resulting from the building's "ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction."[3] To prevail on this strict liability claim, the appellants must prove that (1) there was a building; (2) the defendant was its owner; and (3) injury was caused by a "ruin" resulting from a vice in original construction or neglect to repair. Olsen v. Shell Oil Co., 365 So.2d 1285, 1289 (La.1978).

3. Article 2322 provides: "The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction."

Olsen is the leading case for application of article 2322 to offshore drilling platforms. In Olsen, a number of employees of an independent drilling contractor were killed or injured after a water heater exploded. The heater was installed in a portable living quarters module which was in turn attached to a Shell Oil Company platform. The living quarters module belonged to Movible Offshore, a drilling contractor, and was attached to the platform to provide a place for Movible's employees to live while they drilled. Although the explosion resulted from the contractor's failure to properly maintain the heater, the plaintiffs successfully asserted claims against Shell under article 2322.

The Louisiana Supreme Court in Olsen first determined that a fixed drilling platform is a "building" within the meaning of article 2322. Id. at 1290. The Court then found that the living quarters module

(containing the water heater) was an "appurtenance" to the platform because it was permanently attached to the platform. Next, it determined that article 2322 imposed a nondelegable duty on Shell to keep the platform and its appurtenances in repair despite the fact that Movible owned the water heater. Finally, the Olsen court held that the water heater's explosion, resulting from a neglect to repair it, constituted ruin. Id. at 1292-93.

In Olsen, however, the living quarters module had been in place on the platform for some time. By contrast, in the instant case Hercules was in the process of installing its drilling rig on the platform; at the time of the accident, installation of the rig was only twenty to twenty-five percent complete.

Because Ainsworth was injured as the result of Hercules' unsafe work practices during the installation of the rig on a platform, we are persuaded that Olsen does not

control the outcome of this case. Article 2322 imposes liability on the owner of a building for damage occasioned by its ruin only when the ruin is caused by either neglect to repair the building or vice in its original construction; it does not seek to impose liability for ruin during the construction of a building or the addition of an appurtenance. The Louisiana authorities are consistent with this interpretation.

In Temple v. General Ins. Co. of America, 306 So.2d 915 (La.App. 1st Cir.1974), a brick wall had been destroyed and the plaintiff was rebuilding the wall when it collapsed and injured him. The court found that the plaintiff had not established that the wall collapsed due to "ruin" caused by "neglect to repair it" or a "vice in original construction." The court stated "counsel has not cited to us any case which holds [2322] applicable to the construction or repair of a building. We find no liability herein."

Id. at 917.

The Louisiana Supreme Court cited Temple with approval in Fonseca v. Marlin Marine Corp., 410 So.2d 674 (La. 1981). In that case, Fonseca sued to recover for injuries he sustained after falling from the partially completed second floor of a barn. Fonseca, a carpenter, had been hired to complete construction on the barn. When he began his work, the floor joists were in place on the upper level of the barn. Boards had been temporarily laid but not nailed across those joists. Fonseca stepped on the end of one of those unsecured boards which flipped up and caused his fall.

The court in its initial opinion imposed liability on the owner of the barn under articles 2315, 2317, and 2322. On rehearing, however, the court withdrew its imposition of liability under article 2322, and based its holding on articles 2315 and 2317.

Summary judgment was properly entered in favor of Shell on the claim Ainsworth predicates on article 2322.

III.

The district court correctly granted summary judgment to Shell; accordingly its judgment is affirmed.

AFFIRMED.

649 F. Supp. 1223

Fred H. AINSWORTH, et al.

v.

SHELL OIL COMPANY.

Civ. A. 85-0141-A

United States District Court,
W.D. Louisiana,
Alexandria Division

Dec. 8, 1986

Employee of independent contractor hired to erect drilling rig on offshore platform brought action against platform owner for damages based upon injuries sustained during rigging operation. Owner moved for summary judgment. The District Court, Little, J., held that offshore platform owner was not liable for independent contractor's employee's injuries at time when rig was only 25% to 50% complete.

Defendant's motion for summary judgment granted.

C1

1. Admiralty - 1.20(5)

Law of state of Louisiana, which state was adjacent to accident site, oil platform located in outer continental shelf, applied to adjudicate controversy arising from accident. Outer Continental Shelf Lands Act, §§ 2 et seq., 4, 43 U.S.C.A. §§ 1331 et seq., 1333.

2. Shipping - 84(2)

As principal, owner of oil platform was under no duty to supervise rigging up operation by independent contractor, and thus was not liable for injuries sustained by independent contractor's employee during operation. LSA-C.C. arts. 2315, 2317.

3. Shipping - 84(1)

Principal, which owned oil platform located in outer continental shelf, did not have control over rigging up operation performed by independent contractor, so as to

subject principal to liability for independent contractor's employee's injury, where rig was only 25% to 50% complete, and notwithstanding presence of principal's "company man" at rig at same time of accident. LSA-C.C. arts. 2317, 2322.

Craven, Scott, Weeks & Randow, John W. Scott, Alexandria, La., for Ainsworth.

Allen, Gooch, Bourgeois, Breaux, Robison & Theunissen, Randall K. Theunissen, Lafayette, La., for Hercules Offshore Drilling Co.

Arthur A. Crais, Jr., Adams & Reese, James E. Blazek, Scott E. Delacroix and Edwin C. Laizer, New Orleans, La., for Shell Oil Co.

Lunn, Irion, Johnson, Salley & Carlisle, Brian D. Smith, Shreveport, La., for intervenor.

RULING

LITTLE, District Judge.

While working for Hercules Offshore Drilling Company, Fred H. Ainsworth was injured. To compensate him and his wife for the damages sustained, this suit was filed against the owner of the structure which had hired Hercules to perform erecting services. That owner was Shell Offshore, Inc. or Shell Oil Company.[1] For purposes of this discussion, the owner of the stationary rig will be referred to simply as "Shell".

Shell claims by summary judgment motion that it is not responsible to the plaintiffs for the damages sustained as a result of Mr. Ainsworth's injury. There is no material factual dispute. Summary judgment is

1. Shell Oil Company was the substantial lessee of a block in the Outer Continental Shelf. See Exhibit F, plaintiffs' reply memorandum filed 8 September 1986. Shell Offshore, Inc. and Hercules entered into a Master Drilling Agreement on 5 September 1982 (defendants' Exhibit A filed 15 August 1986).

appropriate, according to Shell. Quite predictively, plaintiffs suggest that Shell is responsible and that summary judgment should not be granted. Even when considered in a light most favorable to the non-moving party, plaintiffs's cryptic and argumentative defense, when judged in the light of the recent pearl from the Supreme Court, Celotex Corp. v. Catrett, 477 U.S. _____, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) will not turn the tide away from the righteousness of defendant's position. The motion is GRANTED.

As we have stated, the facts are not in dispute. Shell owns a platform permanently affixed to the ocean floor on the outer continental shelf. Shell's purpose in being in that location is to explore for fugacious minerals. The platform can be considered as a giant table in the sea with legs permanently affixed to the ocean bottom. In order to explore for oil and gas, a drilling rig must be brought to the platform. In

other words, some structure must be erected on the platform floor (the tabletop) which will perform the actual mechanics of drilling a well, i.e. inserting a drill bit and pipe into the ocean floor to a designated depth. The erection of the rig was the subject of the previously mentioned Master Drilling Agreement and Marine Bid and Drilling Order between Shell and Hercules (Exhibit A attached to Shell's summary judgment motion filed 15 August 1986).

Hercules was obligated to do the erecting activity. Ainsworth worked for Hercules. During a night shift, Ainsworth dropped a tool, searched for it in the dark and fell into a mud tank. Narrowly stated, plaintiff's injury is directly related to Shell's failure to provide lighting on the rig where plaintiff was working. The lack of lighting caused the accident. The structure upon which the plainfiff was working was the

partially erected rig owned and to be operated by Hercules which was affixed, but not permanently, to the defendant's platform.

Summary judgment is a tool used to eliminate applied judicial process to a situation where, in fact, no controversy exists. If applicable, summary judgment accords the moving party a favorable judgment as a matter of law. Simmons v. Lyons, 746 F.2d 265, 266 (5th Cir.1984), citing, Williams v. Shell Oil Company, 677 F.2d 506, 509 (5th Cir.), cert. denied, 459 U.S. 1087, 103 S.Ct. 570, 74 L.Ed.2d 933 (1982); Dorden v. C.H. Heist Corp., 743 F.2d 1135, 1137 (5th Cir.1984) (citations omitted). Fed.R.Civ.P. 56 is well known and will not be reproduced here. Suffice it to say that a majority of the Supreme Court has emoted or issued its interpretation of that rule by offering the following language:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. _____, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265, 273 (1986). It is the contention of Shell that an essential element of its liability is its fault or negligence, actual or implied.

[1] Shell's appreciation of its exposure is properly founded in Louisiana law, even though the incident in question occurred miles beyond the borders of that state. The Shell platform is stationary and is located in the outer continental shelf. This Court has jurisdiction by application of 43 U.S. § 1331 et seq. The law of the state adjacent to the accident site, Louisiana in this case, applies to adjudicate the controversy. 43 U.S.C. § 1333; Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352, 360, 89 S.Ct. 1835, 1839, 23 L.Ed.2d 360 (1969); and Rohde v. Southeastern Drilling Co., Inc., 667 F.2d 1215, 1217 (5th Cir.1982).

Moving to the meat of the matter, defendant suggests that it is not negligent under the standard enunciated in Civil Code article 2315 nor any jurisprudence interpreting that article.

> Every act whatever of man that causes damage to another obligates him by whose fault it happened to repair it....

Article 2315, La.Civ.C.

A duty-risk analysis is most prominently employed in giving content to the previously described Civil Code article. Dixie Drive It Yourself System New Orleans Co. v. American Beverage Company, 242 La. 471, 137 So.2d 298 (1962) is the fountainhead of Louisiana's duty-risk law. In Dixie Drive It Yourself the Louisiana Supreme Court announced the standard to be used in determining whether a defendant has acted negligently, saying that "[t]he essence of the present inquiry is whether the risk and harm encountered by the plaintiff fall within the scope of protection of the statute" [allegedly violated by the defendant]. Id. 137 So.2d at 304. The Fifth Circuit has described the duty-risk analysis in the following manner:

> The determination of whether the defendant owes a duty to the plaintiff and whether the risk of injury sustained by the plaintiff falls within the ambit of that duty is the crucial portion of this analysis, for it supplants the traditional proximate cause inquiry.

Andrus v. Trailers Unlimited, 647 F.2d 556, 558 (5th Cir.1981) (citations omitted). Simply stated, the question is whether the plaintiff is within that class of persons intended to be protected by a given statute or Code article. The traditional elements of negligence must still be proven in order for the plaintiff to recover.

> Under ... articles [2315 and 2316], the elements of a cause of action are fault, causation and damage. The conduct of which the plaintiff complains must be a cause-in-fact of the harm. After determining causation, the Court must also

determine what was the duty imposed on defendant, and whether the risk which caused the accident was within the scope of the duty. A breach of a duty on the part of the defendant which was imposed to protect against the risk involved makes the offender negligent under the above articles."

Vicknair v. Hibernia Building Corp., 479 So.2d 904, 908-09 (La.1985), citing, Dunne v. Orleans Parish School Bd., 463 So.2d 1267 (La.1985); Harris v. Pizza Hut of Louisiana, Inc., 455 So.2d 1364 (La.1984); Smith v. Travelers Ins. Co., 430 So.2d 55 (La.1983).

Assuming arguendo that plaintiff has established the element of causation, plaintiff must next show that there was a duty on the part of Shell to ensure that the rig was properly lit. In order to determine whether such duty existed, one must categorize the

status of plaintiff vis-a-vis Shell. What is the plaintiff? He was an employee of Hercules. Hercules contracted with Shell. The evidence indicates that Hercules was an independent contractor of Shell. The Master Drilling Agreement provides in part that

> Contractor [Hercules] shall furnish the minimum crew complement specified in the Drilling Order, Section 13, and shall furnish the rig and drilling equipment referred to in the Drilling Order, Section 4, and such other equipment, materials and services as specified in the Drilling Order, Section 5, as are to be furnished by contractor to Shell.

Master Drilling Agreement pp. 2-3. The relationship between Hercules and Shell was further described on p. 25 of the Agreement:

> 16.1 Independent Contractor. Contractor is an independent contractor with respect to performance of all work

> hereunder and neither Contractor nor anyone employed by Contractor shall be deemed for any purpose to be the employee, agent, servant or representative of Shell in performance of any work or service hereunder. Shell shall have no direction or control of Contractor or its employees and agents except in the results to be obtained. The work performed hereunder shall meet the approval of Shell and be subject to the general right of inspection provided herein for Shell to secure the satisfactory completion thereof.

P. 25 Master Drilling Agreement. It was further provided that "Contractor shall perform and supervise all work...." (p. 25 Master Drilling Agreement).

[2] As the principal, Shell was under no duty to supervise the rigging up operation. In Robideaux v. Hebert, 118 La. 1089,

43 So. 887 (1907), the Louisiana Supreme Court established the rule that a principal who hires an independent contractor is under no duty to supervise or protect the employees of that independent contractor. Id. 43 So. at 889. See also Olsen v. Shell, 561 F.2d 1178, 1191 (5th Cir.1977) ("'The general rule is that the servants of an independent contractor must look to him (and not to the person with whom he has contracted) for injuries which they receive through his fault or negligence.'") (citations omitted) (applying La. law); Daroca v. Metropolitan Life Ins. Co., 121 F.2d 917, 919 (5th Cir.1941) ("Plaintiff was neither a tenant nor a third person lawfully, but accidentally, on the premises nor a passerby. He was a workman engaged in making repairs to the building.... As to him there is no doubt whatever the owner was not responsible for

any negligence of an independent contractor" (citation omitted).

In a recent interpretation of Louisiana tort law in this area, the Fifth Circuit, sitting in diversity, had the following to say about the liability of a principal to an employee of an independent contractor:

> It is a fundamental principle of tort law that one cannot be liable for negligence based on a failure to act unless one first has a duty to act. This principle is reflected in the general rule that one employing an independent contractor ... is normally not under a duty to take affirmative action to protect the employees of that independent contractor from injury in the course of the contracted work.

Futo v. Lykes Bros. S.S. Co., Inc., 742 F.2d 209, 214 (5th Cir.1984) (citations omitted).

Thus, it is clear that plaintiff has failed to establish an essential element of liability, to wit: duty. There can be no recovery under La.Civ.Code art. 2315.

But does Civil Code article 2317 establish relief for Mr. Ainsworth?

> We are responsible, not only for the damages occasioned by our own act, but for that which is caused by the acts of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications.

This article creates a theory of strict liability developed, to a great extent, over a decade ago by the late Albert Tate, Jr., when he was a Louisiana Supreme Court Justice and prior to his appointment to the federal Fifth Circuit Court of Appeals. The seminal case is Loescher v. Parr, 324 So.2d 441

(La.1975). The philosophy is not muddy. A thing which on account of a vice or defect causes damage while in the care or custody of the owner subjects the owner-guardian-custodian to liability for the damage caused. The fault is supplied by law. Thus, an owner of a tree, which, unknown to the owner, is rotten and falls on a victim will be responsible for the damage suffered by the victim unless the victim was at fault, or a third party was at fault or an irresistible force was the source of the damage. Loescher v. Parr, supra, at 449. The language of article 2317 is inapplicable to the case sub judice. The rig is not owned by Shell, nor is it in Shell's custody. The above quoted evidence in regards to the ownership of the rig and the relationship between Hercules and Shell establish the fact that the rig was to be owned and operated by Hercules.

[3] Nor was the rig under the direction or control of Shell. Hercules gives much import to the fact that Shell had a representative on the platform. It is true that Shell had a so-called "company man" on the rig at the time of the accident. Louisiana law provides an exception to the rule of non-liability of a principal for the injuries to the employees of his independent contractor when the principal oversees the operations. "[T]he principal may be liable for the acts of the independent contractor over which it has exercised operational control or which it has expressly or impliedly authorized." Hawkins v. Evans Cooperage Co., 766 F.2d 904,906 (5th Cir.1985), citing Wallace v. Oceaneering Int'l., 727 F.2d 427, 437 (5th Cir.1984); McCormack v. Noble Drilling Corp., 608 F.2d 169, 174 (5th Cir.1979); Touchstone v. G.B.Q. Corp., 596 F.Supp. 805, 815 (E.D.La.1978); Ewell v. Petro Processors of Louisiana, Inc.,

364 So.2d 604, 606-07 (La.App.1978) writ denied, 366 So.2d 575 (La.1979). This Court is of the opinion that the plaintiff has failed to show the control on the part of Shell necessary to establish liability under article 2317.

In Wallace, supra, an offshore oil field diver brought suit against his employer, a diving contractor, the drilling contractor and the owner of an oil well for injuries sustained while on a diving assignment in support of a drilling operation at the oil well. After stating the principle regarding independent contractors, the court observed that there was only one employee of the well owner at the drill site and further that:

> His role was that of the usual "company man" in the offshore oil patch. He monitored the progress of the work of the independent contractors, making sure that the result was what the oil company

> had bargained for.... Although he could have ordered the work stopped if he observed an obviously dangerous situation, inspections of equipment and the choice of safe work methods were understood by all to be the responsibility of [the drilling contractor], and as to diving equipment and procedures, [the diving contractor].... [The company man] had no actual control or responsibility for the details of the drilling and diving work, but merely inspected progress.

727 F.2d 427, 436-37 (5th Cir.1984). The Court of Appeals found that these facts reflected that the company man had no control over the particular operation in which the diver was injured and that the well owner could not be held liable for the negligence of the independent contractors.

In Steele v. Helmerich & Payne International Drilling Co., 738 F.2d 703 (5th Cir.1984) the issue was whether a stabbing board which was negligently attached to a cable was in the custody and control of the defendant rig owner so as to render the defendant liable under article 2317. In affirming the district court's grant of summary judgment to the defendant in this diversity action, the Fifth Circuit noted the stipulation of the party in regards to their relationship. The stipulation reflected the following:

> [N]one of the equipment, including the stabbing board, was owned by the defendant; no employee of defendant was in the derrick assisting in rigging up the equipment; the casing operation was not the responsibility of the defendant; Weatherford-Lamb [the casing contractor] was in complete charge of the operation

> of rigging up the stabbing board; defendant was not responsible for inspecting Weatherford-Lamb's equipment prior to its use on the rig; it was not anticipated that any of defendant's personnel would utilize the stabbing board during the casing operation.

Id. at 707. The Master Drilling Agreement supports the following conclusions: The rig, as well as all the equipment being used, was owned by Hercules; no Shell employees assisted in the "rigging up" operations; Hercules was in complete charge of the operation; Shell was not responsible for inspecting Hercules' equipment.

Finally, in Colleps v. State Farm General Ins. Co., 446 So.2d 988 (La.App. 3d Cir. 1984) plaintiff tried to establish that an allegedly defective ladder on which plaintiff had injured himself was in the care and custody of the defendant so as to render the

defendant liable under article 2317. In Colleps the ladder was owned by the plaintiff. He had brought it to his son-in-law's house to help the latter build a house. The plaintiff argued that the ladder was in the exclusive possession and control of his son-in-law. In affirming the trial court's dismissal of the suit, the Louisiana Third Circuit noted that the plaintiff owned the ladder, allowed persons to use the ladder at the home site, had supervised the placement of the ladder prior to the accident and was using his own ladder at the time of the accident. The court concluded that the plaintiff had "failed to prove custody by [the defendant], an essential element under article 2317. Id. at 990. Plaintiff herein has failed to allege facts which would distinguish this case from Wallace, Steele and Colleps. The key here is that the rig, if defective due to lack of lighting, is

brought in the defective condition as a temporary appendage to defendant's "thing" (the platform) and that appendage is neither owned nor controlled by Shell. The element of custody simply isn't present.

Could Civil Code article 2322 afford the plaintiff a basis for recovery?

> The owner of a building is answerable for the damage occasioned by its ruin when this is caused by neglect to repair it or when it is the result of a vice in its original construction.

At first blush it would seem so. Authorities such as Olsen v. Shell Oil Co., 365 So.2d 1285 (La.1979), Steele v. Helmerich & Payne, 738 F.2d 703 (5th Cir.1984) and Moczygemba v. Danos & Curole Marine Contractors, 561 F.2d 1149 (5th Cir.1977) could precipitate a logical although superficial analysis as follows:

> A fixed drilling platform together with its necessary appurtenances is a

building within the contemplation of article 2322. The owner of a fixed platform is liable for injuries resulting from a defective drilling rig even though title to the rig is vested in another and the rig will, at some time, be removed from the platform.

The case of Olsen v. Shell, supra, is factually similar to this case. A drilling contractor moved its drilling equipment onto a stationary platform. Included in this move was a modular living compound which itself included two electric water heaters. All of the equipment including the rig, the living unit and the water heaters belonged to and would be removed by the contractor. After everything was in place and the contractor's employees were conducting and actively drilling a well, a defective water heater exploded and killed employees of the contractor. In response to substantive questions of

Louisiana law certified to it by the U.S. Fifth Circuit Court of Appeals, the Louisiana Supreme Court, again speaking through Albert M. Tate, Jr., concluded that the platform owner, Shell Oil Company, was responsible for the defective water heater moved to the rig by the contractor, installed by the contractor, used by the contractor and which would be removed by the contractor and over which Shell Oil Company never exercised any control either actual or contractual! This rather harsh result stems from article 2322 which makes an owner liable for damages caused by defects in its structure or appurtenances.

> In the absence of another statute providing otherwise, the strict liability under article 2322 of the owner of a building for harm caused by defects in its structure or appurtenances imposes a non-delegable duty upon him to keep his building and appurtenances in repair and to be responsible to third persons for

harm caused by any defect in the structure or its appurtenances.

Olsen v. Shell, supra, at 1291. That language should ice plaintiffs' case and provide an affirmative non-delegable duty on Shell's part to provide lighting on the Hercules rig for the benefit of Mr. Ainsworth, the Hercules employee.

Not so. The difference between Olsen and Ainsworth is obvious. The rig on the platform in Olsen was complete and operational. The personnel hut was affixed, the water heaters were connected, the drilling operation was in process. The rig was a live, vibrant appurtenance to the platform. In Ainsworth, the rig was 25-50% complete. Three to four days of work remained before it could be operational (plaintiff's motion for summary judgment p. 15). It (the rig) had not acquired the status of appurtenance to bring it under Shell's article 2322 responsibility. In his deposition taken 23

December 1985 plaintiff, Fred Ainsworth, testified that the construction of the rig was not completed at the time of the accident, that one-fourth of the work had been completed and that it would take three to four more days to finish the construction (Ainsworth deposition pp. 109-110). William Clyde Coward, president of Hercules, testified at his deposition that the rigging up process was 20-25% completed at the time of the accident. He stated that it normally takes ten to twelve days to rig up. When Ainsworth was injured it was the second or third day of the rig up (Coward deposition p. 8). Arthur R. Dunn, Jr. testified that the rig up operation was one-fourth to one-third complete at the time of Ainsworth's injury (Dunn deposition pp. 10-11).

> For an object to qualify as an appurtenance, it must be, with some degree of permanence, an integral part of the building.

Steele v. Helmerich & Payne Intern Co., 565 F.Supp. 993, 997 (E.D.La.1983). This case was affirmed on appeal in 738 F.2d 703 in an opinion written by Judge W. Eugene Davis. The determining factors for classifying something as an appurtenance became exact in that opinion. At page 705 the court stated:

> In determing whether an attachment is an appurtenance of a building the two general considerations are: how securely the addition is attached to the building and the degree of permanence the parties intend for the addition.

The clear teaching of Steele, supra, and the authorities cited by the Court is that there must be a complete creation of the tangible property before it can be considered an appurtenance. A partially completed inoperable drilling rig is not an appurtenance. A complete drilling rig has never been completed let alone affixed with any degree of permanence to the platform floor.

Liability of a property owner for the ruin or defect of an appurtenance can hardly apply until the object is formed or created in the likeness intended by its creator.

Defendant's motion for summary judgment is GRANTED.

Supreme Court, U.S.
FILED
APR 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-1466

In the Supreme Court of the United States

OCTOBER TERM, 1987

FRED H. AINSWORTH AND GLORIA AINSWORTH
Petitioners

versus

SHELL OFFSHORE INC.
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JAMES E. BLAZEK
Counsel of Record
EDWIN C. LAIZER
SCOTT E. DELACROIX
ADAMS AND REESE
4500 One Shell Square
New Orleans, Louisiana 70139
Telephone: (504) 581-3234
Attorneys for Respondent,
Shell Offshore Inc.

and

JUDITH Y. ROBERTSON
Shell Offshore Inc.
4955 One Shell Square
New Orleans, Louisiana 70139
Attorney for Respondent,
Shell Offshore Inc.

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTION PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Fifth Circuit was correct in affirming the district court's grant of summary judgment dismissing plaintiff's Louisiana law tort claims where suit had been pending for over a year-and-a-half prior to defendant's filing a motion for summary judgment, plaintiffs never requested, pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, that defendant's motion for summary judgment be denied or continued pending further discovery, and the undisputed evidence presented to the district court revealed that there was no genuine issue as to any material fact and that Shell Offshore Inc. was entitled to judgment as a matter of law?

LIST OF INTERESTED PERSONS

1. Fred H. Ainsworth and Gloria Ainsworth
   Plaintiffs/Petitioners

2. Shell Offshore Inc.[1]
   Defendant/Respondent

3. Shell Oil Company

4. Hercules Offshore Drilling Company

5. Midland Insurance Company

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[1] Pursuant to Supreme Court Rule 28.1, Shell Offshore Inc. provides the following list of its parent, subsidiary and affiliate companies:

Shell Energy Resources Inc.
Pecten International Company
Scailop Coal Corporation
Shell Gas Pipeline Company
Shell Gas Trading Company
Shell Mining Company
Shell Western E & P Inc.
SOI Royalties Inc.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Shell Offshore Inc., respectfully prays that the Petition for Writ of Certiorari filed by Petitioners in this case, requesting review of the decision of the United States Court of Appeals for the Fifth Circuit entered October 14, 1987, and its denial of the Petition for Panel Rehearing entered on November 9, 1987, be denied, for the reasons set forth below.

OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit rendered its opinion on October 14, 1987 (Petitioners' App. at B1-B23). This opinion is reported at 829 F.2d 548.

The United States District Court for the Western District of Louisiana rendered its opinion on December 8, 1986 (Petitioners' App. at C1-C31). The district court

opinion is reported at 649 F.Supp. 1223.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit (Petitioners' App. at B1 - B23) was entered on October 14, 1987. A Petition for Panel Rehearing was denied on November 9, 1987 (Petitioners' App. at A1 - A2). The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C.A. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Federal Rule of Civil Procedure 56 (reproduced in Appendix).

2. Louisiana Civil Code Art. 2315.

> LIABILITY FOR ACTS CAUSING DAMAGES.
> Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.
>
> Damages may include loss of consortium, service, and society, and shall be recoverable by the same respective categories of persons who would have had a cause of action for wrongful death of an injured person.

3. Louisiana Civil Code Art. 2317.

> ACTS OF OTHERS AND OF THINGS IN CUSTODY.
> We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the acts of persons for whom we are answerable, or of the things

which we have in our custody. This, however, is to be understood with the following modifications.

4. Louisiana Civil Code Art. 2322.

DAMAGE CAUSED BY RUIN OF BUILDING. The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction.

STATEMENT OF THE CASE

Petitioners, Fred H. Ainsworth and Gloria Ainsworth, filed suit against Shell Offshore Inc. (originally incorrectly referred to as Shell Oil Company and hereinafter referred to as "Shell") on January 16, 1985, alleging that Shell, as the owner of a fixed platform on which plaintiff's employer, Hercules Offshore Drilling Company (hereinafter referred to as "Hercules"), had been hired to erect its drilling rig, was somehow responsible for injuries allegedly sustained by Mr. Ainsworth in an accident which occurred on October 25, 1984 during construction of the Hercules rig by the Hercules crew. Subsequently, Shell filed a third party complaint against Hercules.

An initial pre-trial conference was set for January 3, 1986. According to the rules of the district court, discovery was to be completed and all motions to compel discovery filed on or before January 3, 1986. At the pre-trial conference, trial was set to begin September 15, 1986, with a new cut-off date for dispositive motions and the taking of discovery being set for August 15, 1986. During the time between January 3, 1986 and August 15, 1986, discovery was undertaken by plaintiffs as well as defendants.

On August 15, 1986, over a year-and-a-half after the complaint had been filed, Shell filed its motion for summary judgment. It should be noted that pursuant to the previously mentioned deadlines, this motion was filed on the dispositive motion cut-off date, which was also the discovery cut-off date. Shell supported its Motion for Summary Judgment with the deposition testimony of several persons, including the plaintiff, as well as a copy of the Master Drilling Agreement and Marine Bid and Drilling Order which existed between Shell and Hercules.

Plaintiff filed an opposition to Shell's Motion for Summary Judgment on August 25, 1986. The opposition contained no affidavit pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, nor was any request ever made of the district court that it refuse the application for summary judgment or order a continuance to permit discovery to be had prior to ruling on the motion.

The Motion for Summary Judgment was under advisement by the district court until ruled upon on December 9, 1986. During the time the motion was under advisement, plaintiffs undertook discovery, noticing and re-noticing the depositions of numerous doctors in preparation for trial. However, no deposition notices were ever filed for any fact witness during this time period.

On December 9, 1986, the district court ruled, granting Shell's Motion for Summary Judgment and setting forth findings of fact and conclusions of law. (Petitioners' Appendix at C1-C31). This judgment was affirmed by the United States Court of Appeals for the Fifth Circuit on October 14, 1987. (Petitioners' Appendix at B1-B23). A Petition for Panel Rehearing was denied on November 9, 1987. (Petitioners' Appendix at A1-A2). Subsequently, petitioners filed this writ of certiorari.

The facts underlying this case are not in serious dispute. Shell owns an offshore platform permanently affixed to the floor of the Gulf of Mexico on the Outer Continental Shelf off the Louisiana coast in Vermilion Block 221. In order to utilize the platform to explore for oil and gas, a drilling rig must be brought to and assembled on the platform. Shell hired an independent contractor, Hercules, to furnish the rig and drill the well from the bare Shell platform.

Pursuant to the contract between Shell and Hercules, Hercules was obligated to transport its drilling rig offshore and assemble it on Shell's platform. Petitioners allege that Mr. Ainsworth was injured on October 25, 1984, during the rigging up of Hercules' rig when, during a night shift, he dropped a tool, searched for it in the dark and fell into a mud tank on the Hercules rig.

Even when taken in a light most favorable to the petitioners, the undisputed facts reveal no genuine issues. The Master Drilling Agreement between Shell and Hercules clearly shows that Hercules contracted with Shell to operate as an independent contractor in the performance of all work under the contract. Shell was to give no directional control over the work and was to have only a general right of inspection to secure satisfactory completion of the contract. Hercules, on the other hand, was to perform and supervise all work as an expert independent contractor. This was confirmed by Ainsworth himself in his deposition, as well as by the deposition testimony of the president of Hercules, Mr. Coward.

The deposition testimony submitted to the district court further showed that Hercules had three supervisors on its rig and that Ainsworth received all his orders from these individuals. While Hercules had 20 to 25 people present, Shell had only one or two, who were operating in the position of "company man".

The deposition of Mr. Coward, as well as the deposition of the plaintiff and the affidavit of Darrel Cruise, confirmed that no Shell employees participated in the rig-up. In fact, Cruises's affidavit, which was submitted by petitioners in opposition to the Motion for Summary Judgment, specifically states that instructions regarding the work were given to the Hercules crew by one of the Hercules toolpushers.

The undisputed evidence presented to the district court also indicated that Hercules owned the rig, including the area in which Mr. Ainsworth fell, and that Hercules owned all equipment used in the rig-up. According to the testimony of Mr. Coward, Hercules had sole responsibility, charge, supervision, custody, care and control of all such property, and had the responsibility for providing all lighting on the platform. Specifically, Coward testified that the Hercules toolpusher was responsible for making sure that lighting was proper and adequate.

The undisputed evidence at the trial court level indicated that at the time of the accident, the construction of the rig was no more than 25% to 50% complete and that at least 3 or 4 more days would be necessary to finish building the rig. As will be discussed in more detail below, it is respectfully submitted that on these, facts, the district court was entirely correct in granting Shell's Motion for Summary Judgment and the appellate court was entirely correct in affirming this ruling.

ARGUMENT

I. *No Special and Important Reasons Exist to Grant Certiorari*

For many years, in determing whether writs of certiorari should be granted, this Court has applied the principle

> . . . that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."

Layne and Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393, 67 L.Ed. 712, 714, 43 S.Ct. 422, 423 (1923). For this reason, U.S. Supreme Court Rule 17.1 makes clear that review on writ of certiorari will be granted only when there are "special and important reasons therefore". The rule sets forth the following examples of the "character of reasons" that will justify review:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Reference to petitioners' papers in this matter will show the noticeable absence of any statement regarding

the existence of such "special and important reasons" for review. The explanation for this, of course, is that no such reasons exist. Certainly there is no conflict among the federal courts of appeal on the issues involved here; nor does the decision of the court of appeals conflict on any federal question with a state court of last resort; nor does this case present an important and undecided question of federal law; nor does the court of appeals' decision conflict with applicable decisions of this Court; nor have any of the lower courts departed from the accepted and usual course of judicial procedings. Rather, this case, which involves primarily questions of the application and interpretation of Louisiana law, has been carefully reviewed and correctly decided by the United States District Court for the Western District of Louisiana and the United States Court of Appeals for the Fifth Circuit. Petitioners' writ of certiorari should be denied since the case lacks the type of elements which this Court has traditionally required before exercising its review.

Rather than pointing out any "special and important reasons" why the case should be heard, petitioners apparently argue (1) that the lower courts improperly granted summary judgment to respondent; and (2) that in so doing, the lower courts misapplied Louisiana Law, which controlled the substantive issues in this platform case. As will be pointed out below, however, the handling of this case by the lower courts was entirely correct, both procedurally and substantively.

II. *The Procedural Handling of This Case by the Lower Courts Was In Complete Compliance With the Guidelines Set Forth By This Court*

In a recent triumvirate of cases, this Court has clearly and concisely set forth the standards which should guide the handling and review of motions for summary judgment. *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct.

2548, 91 L.Ed. 265 (1986); *Matsushita Elec. Inc. Co. v. Zenith Radio,* 475 U.S. 574, 89 L.Ed.2d 538, 106 S.Ct. 1348 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Specifically, this Court has stated:

> . . . the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to judgment as a matter of law' because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex, 106 S.Ct. at 2552-53, 91 L.Ed.2d at 273. The standard of Rule 56 provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise proper motion for summary judgment; what is required is that there is no *genuine* issue of *material* fact. *Anderson,* 91 L.Ed. at 211. One opposing a motion for summary judgment must do more than simply show that there is some 'metaphysical doubt' as to the material facts. *Matsushita Electric,* 475 U.S. at 586, 89 L.Ed.2d at 552. The question as to which facts are material is one which will be determined by reference to the applicable substantive law. Only disputes over facts that might affect the outcome of the suit properly preclude the entry of summary judgment. "Factural disputes that are irrelevant or unnecessary will not be counted." *Anderson,* 91 L.Ed.2d at 202.

As wil be discussed more fully below, petitioners made claims against respondent pursuant to Louisiana Civil Code Articles 2315, 2317 and 2322. In order to establish liability under each of these articles, certain elements must be shown. The lower courts agreed with respondent's contentions that petitioners, who would bear the burden of proof on each of these elements at trial, had failed to make a showing sufficient to establish the existence of at least one of these elements with regard to each of the asserted bases of liability. Accordingly, summary judgment was proper under the rule enunciated by this Court in the language quoted above from the *Celotex* case.

Petitioners initially claim that respondent's motion was improperly supported because "the only evidence submitted by Shell was a copy of its contract with Hercules." (Petitioners' writ application at p. 10). As the opinion of the United States Court of Appeals for the Fifth Circuit makes clear, this statement is obviously inaccurate in that Shell's motion was also supported by the deposition testimony of the plaintiff himself, as well as that of William Coward, the president of Hercules, and Arthur Dunn, a Shell purchasing executive. The support for Shell's motion was clearly more than sufficient in view of the statements in *Celotex* and the plain language of Rule 56(a) that a party may move for summary judgment "with or without supporting affidavits." The lower courts, which considered the evidence submitted by Shell and the opposing evidence submitted by petitioners, clearly believed that the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits" showed that there was no genuine issue as to any material fact and that Shell was entitled to judgment as a matter of law.

Petitioners also complain that the motion was ruled upon before they had the opportunity to complete discovery. In order to evaluate this claim, the procedural

history of the case must be kept in mind. By the time Shell's motion was filed, the case had been pending for approximately one-and-a-half years and was one month from the scheduled trial date. Two court-imposed discovery cut-off deadlines had already passed. Petitioners took no depositions while this case was pending at the district court level. In fact, even after the motion was filed and while it was under advisement, petitioners requested only that certain medical depositions be taken and made no attempt to notice any depositions reagrding the issues involved in the motion. Respondent submits that this is because petitioners erroneously believed that the motion would be denied when, in fact, they had failed to make a showing sufficient to establish the existence of elements essential to their case. *Celotex,* 91 L.Ed.2d at 273.

Given the time that this case had been on the docket and the fact that the parties had conducted discovery, no serious claim can be made that petitioner was in any way "railroaded" by a premature motion. As is pointed out in *Celotex,* any potential problem with such motions can be adequately dealt with under Rule 56(f), which allows the Court to refuse an application for summary judgment or order a continuance to permit affidavits to be obtained or depositions to be taken, if it appears from the affidavits of a party opposing a motion for summary judgment that he cannot, for reasons stated in his affidavit, present facts essential to his opposition. In the instant case, petitioners never made a request for denial or continuance of the motion in accordance with the simple procedure set forth in Rule 56(f). In the absence of such an affidavit, or some equivalent statement, the district court in this matter need not have considered a continuance. *Fontenot v. Upjohn Co.,* 780 F.2d 1190, 1194 (5th Cir. 1986). Petitioners essentially suggest that the district court should have engaged in an exercise in mind reading and determined that they desired to do further discovery. This is, of course, not required

under Rule 56 or the relevant decisions of this Court.

Furthemore, even if petitioners had made a request pursuant to Rule 56(f), the decision as to whether to grant a continuance in order to allow a party to proceed with further discovery is one which rests within the discretion of the trial court, to be disturbed on appeal only if its decision reflects an abuse of discretion. *Paul Kadair, Inc. v. Sony Corp. of America*, 694 F.2d 1017, 1029 (5th Cir. 1983); *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 550 (5th Cir. 1980), *cert deneid*, 454 U.S. 927 (1981); *Walters v. City of Ocean Springs*, 626 F.2d 1317, 1321 (5th Cir. 1980). As recited above, the procedural history of this case makes clear that the trial court would have had more than adequate reasons to deny a request for continuance and would have been totally within its discretion in doing so.

In summary, the lower courts handled this matter correctly from a procedural standpoint. Respondent's Motion for Summary Judgment was properly supported, and the record and opinions of the lower courts indicate that they carefully considered the evidence before them and determined that there were no genuine issues of any material fact. Considering that this is precisely what Rule 56 and the relevant decisions of this Court require to be done, respondents suggest that there is no issue worthy of review here and that petitioners' writ of certiorari should be denied.

III. *The Decision of the Lower Courts Is Correct Under Applicable Louisiana Law*

Another compelling reason why review should be denied in this case is that all the substantive questions with regard to liability were controlled by the law of the State of Louisiana since the accident sued upon occurred on a stationary and fixed platform located on the Outer

Continental Shelf off the coast of Louisiana. State law, of course, applies on such platforms as surrogate federal law. *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 22 L.Ed.2d 360, 89 S.Ct. 1835 (1969). Petitioners presented claims under Louisiana Civil Code Articles 2315, 2317 and 2322, each of which requires the proof of certain elements in order to establish liability. As is discussed below, at least one of the required elements for each of these theories of liability was shown to be absent by the overwelming weight of the summary judgment evidence. Therefore, under *Celotex*, summary judgment was appropriate.

1. *Louisiana Civil Code Article 2315*

Louisiana Civil Code Article 2315 sets forth the right to recover for the negligence of another. The Louisiana Supreme Court has interpreted this Article under what is known as a duty-risk analysis. *Dixie Drive It Yourself System of New Orleans Co. v. American Beverage Co.*, 242 La. 417, 137 So.2d 298 (1962). A duty-risk analysis supplants the traditional proximate cause inquiry, requiring instead a determination of whether the defendant owed a duty to the plaintiff and whether the risk of injury sustained by the plaintiff fell within the ambit of that duty. The existence of a duty is, accordingly, an essential element of the claim for negligence under Louisiana law.

Shell's Motion for Summary Judgment on the negligence claim was granted because the undisputed facts showed that Shell did not owe a duty to Ainsworth in this situation. This is because under Louisiana law, a principal is not liable for offenses committed by an independant contractor in the course of performing its contractual duties. *Hawkins v. Evans Cooperidge Co., Inc., 766 F.2d 904 (5th Cir. 1985); Robideaux v. Hebert,* 118 La. 1089, 43 So. 887 (1907). As is more fully set forth in the opinions rendered by the Fifth Circuit (Petitioners' App. at B1-B23) and the district court (Petitioners' App. at C1-C31), the summary

judgment evidence clearly showed that at the time of his injury, Ainsworth was an employee of Hercules, which had contracted with Shell to place its rig on Shell's platform. The evidence clearly indicated that Shell had no control over the operations undertaken by Hercules and did nothing to cause the accident involved in this case. Ainsworth's own testimony was to the effect that he received all of his orders from Hercules' supervisors and that he had never received any instructions from any Shell employee. As a result, Shell, as a principal hiring an independent contractor, had no duty to the plaintiff under Louisiana law. Since, in the absence of such a duty, petitioners could not recover from Shell, it is clear that an essential element of plaintiffs' claim was absent. Under *Celotex*, therefore, summary judgment was appropriate.

2. *Louisiana Civil Code Article 2317*

Louisiana Civil Code Article 2317 imposes strict liability in situations where a defective object within the custody or control of a defendant causes injury. The Louisiana Courts have held that liability can be imposed under Article 2317 only when:

(1) the thing causing damage was in the defendant's custody;

(2) the thing had a vice or defect, and

(3) the vice or defect occasioned damage.

Stewart v. Sam Wallace Indus. Co., 409 So.2d 335 (La.App. 1st Cir. 1981), *writ refused*, 413 So.2d 497 (La. 1982). "Custody" as used in this article means supervision and control. *Steele v. Helmerich & Payne International Drilling Co.*, 738 F.2d 703, 707 (5th Cir. 1984); *Colleps v. State Farm General Insurance Company*, 446 So.2d 988 (La.App.3d Cir. 1984).

As is more fully set forth in the lower court opinions, the uncontroverted summary judgment evidence revealed

that Shell did not have custody of the Hercules drilling rig. All the summary judgment evidence indicated that the materials involved belonged to Hercules and that no Shell employees were expected to participate in the rig-up, for which Hercules bore full responsibility. Without "custody" there can be no liability under Article 2317, since custody is one of the essential elements which must be proved in order for liability to exist. Again, because petitioners completely failed to set forth any evidence to support this essential element of their claim under Article 2317, summary judgment was appropriate under *Celotex*.

3. *Louisiana Civil Code Article 2322*

Finally, petitioners asserted liability under Louisiana Civil Code Article 2322, which imposes strict liability on building owners under certain circumstances. The Louisiana authorities are clear that in order to establish liability under Article 2322, the plaintiff must prove the following essential elements:

(1) that there was a building;

(2) that the defendant was the owner; and,

(3) that there was a ruin caused by a vice in construction or a neglect to repair the building.

Olsen v. Shell Oil Company, 365 So.2d 1285, 1289 (La. 1979).

The undisputed facts of this case revealed that the drilling rig on which Ainsworth was injured was under construction at the time of his accident. As a result, the lower courts correctly concluded that under Louisiana law, any "ruin" could not have resulted from a "vice in original construction" or a "neglect to repair". Since this is one of the essential elements which must be proved for liability to exist under Article 2322, this claim was properly disposed of by summary judgment.

In essence, the holding of the lower courts was that as a matter of law, Article 2322 is inapplicable to situations involving injuries which occur during construction. This interpretation is consistent with numerous Louisiana authorities such as *Temple v. General Insurance Co. of America*, 306 So.2d 915 (La.App. 1st Cir. 1974); *Fonseca v. Marlin Marine Corp.*, 410 So.2d 674 (La. 1981); *Rapattoni v. Commercial Union Ins. Co.*, 378 So.2d 953 (La.App.3d Cir. 1979); *Stine v. Creel*, 417 So.2d 1243 (La.App. 1st Cir. 1982), *writ denied*, 422 So.2d 163 (La. 1982); *Daroca v. Metropolitan Life Ins. Co.*, 121 F.2d 917 (5th Cir. 1941); and *Matthews v. Southern Amusement Co.*, 199 So.2d 403 (La.App.3d Cir. 1967). The question of whether a specific state statute is applicable to a given fact situation is, of course, one which is mostly appropriately left to the state courts and lower federal courts which are most familiar with the idiosyncracies and interpretations of the particular statute involved.

CONCLUSION

Respondent, Shell Offshore Inc., respectfully submits that there are no "special and important reasons" why this case should be reviewed by this Court. The issues involved here, which were correctly decided by the lower courts, are primarily ones of the interpretation and application of the law of the State of Louisiana and have no substantial importance or application outside of the state. Furthemore, the lower federal courts in this matter followed the teachings of this Court in *Celotex* and the guidelines of Rule 56 precisely in ruling on respondent's Motion for Summary Judgment. Accordingly, the case does not merit review and respondent, Shell Oil Offshore Inc., submits

that the Petition for Writ of Certiorari filed by Fred H. Ainsworth and Gloria Ainsworth should be denied.

Respectfully submitted,

ADAMS AND REESE

JAMES E. BLAZEK
Counsel of Record
EDWIN C. LAIZER
SCOTT E. DELACROIX
4500 One Shell Square
New Orleans, Louisiana 70139
Telephone: (504) 581-3234
Attorneys for Respondent,
Shell Offshore Inc.

and

JUDITH Y. ROBERTSON
Shell Offshore Inc.
4955 One Shell Square
New Orleans, Louisiana 70139
Attorney for Respondent,
Shell Offshore Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Brief in Opposition has been served upon all counsel of record by depositing same into the United States Mail, properly addressed and postage prepaid, this _____ day of April, 1988.

JAMES E. BLAZEK
EDWIN C. LAIZER
SCOTT E. DELACROIX

and

JUDITH Y. ROBERTSON

APPENDIX A

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, countercliam, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answes to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material

facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissable in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.